

IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

COMPLETE TITLE OF CASE

MICHAEL L. MACKEY, et al.,

Respondents-Appellants,

v.

STEVEN B. SMITH, M.D., et al.,

Appellants-Respondents.

DOCKET NUMBER WD76214
(Consolidated with WD76215 and WD76252)

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: August 12, 2014

APPEAL FROM

The Circuit Court of Nodaway County, Missouri
The Honorable Roger M. Prokes, Judge

JUDGES

Division I: Pfeiffer, P.J., and Hardwick and Mitchell, JJ.

CONCURRING.

ATTORNEYS

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Attorneys for Respondents-Appellants
Michael L. Mackey and Billie R. Mackey,

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Smith, M.D., and Northland Bone & Joint, Inc.,

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DiStefano and SSM Regional Health Services.



MISSOURI APPELLATE COURT OPINION SUMMARY MISSOURI COURT OF APPEALS, WESTERN DISTRICT

MICHAEL L. MACKEY, et al.,)
)
Respondents-Appellants,)
v.) **OPINION FILED:**
) **August 12, 2014**
STEVEN B. SMITH, M.D., et al.,)
)
Appellants-Respondents.)

WD76214 (Consolidated with WD76215 and WD76252)

Nodaway County

Before Division I Judges: Mark D. Pfeiffer, Presiding Judge, and Lisa White
Hardwick and Karen King Mitchell, Judges

Dr. Thomas V. DiStefano and his employer, SSM Regional Health Services, and Dr. Steven B. Smith and his employer, Northland Bone & Joint, Inc., each appeal the judgment of the Circuit Court of Nodaway County, Missouri, awarding Michael L. Mackey and his wife, Billie R. Mackey, damages against all appellants. Appellants each allege several points of trial error. The Mackeys cross-appeal, claiming that the circuit court erred in refusing to award post-judgment interest on the damage award.

AFFIRMED.

Division I holds:

The Mackeys' claims against Dr. DiStefano and his employer were not barred by the two-year statute of limitations for medical malpractice because the savings statute applied to preserve the Mackeys' claims against them. The Mackeys suffered a nonsuit in their first action, the claims raised against Dr. DiStefano and his employer in the second action were identical to those of the nonsuited action, and Dr. DiStefano and his employer were added to the existing lawsuit against Dr. Smith and his employer within one year of the nonsuit, meaning that the second action as to Dr. DiStefano and his employer had commenced within one year of the nonsuit.

Although the nine jurors who found Dr. DiStefano and his employer liable for the Mackeys' injuries did not all fall within the group of ten jurors who found Dr. Smith and his employer liable for the Mackeys' injuries, the result did not violate the same juror rule, also known as the rule of nine. Different groups of nine jurors may determine liability for different claims or of different defendants, as long as at least nine jurors agree both on liability and damages for each claim or of each defendant, as was the case here.

The trial court did not err in submitting to the jury an instruction based upon MAI 19.01. MAI 19.01, which uses the language "directly caused or directly contributed to cause damage," applies to successive tortfeasors as well as to joint tortfeasors, and it does not serve to impute the liability of a successive tortfeasor to an initial tortfeasor in successive tort situations. Therefore, it does not violate RSMo section 538.210.2(3).

There was substantial evidence to support the jury's determination as to causation of the Mackeys' injuries with respect to both sets of medical provider defendants notwithstanding the arguments of those defendants on appeal. Also, the jury's award was not obviously out of line or grossly improper warranting remittitur or a new trial.

Finally, the circuit court did not err in refusing to award post-judgment interest to the Mackeys because RSMo section 538.300 has clearly eliminated post-judgment interest in medical malpractice actions.

Opinion by: Mark D. Pfeiffer, Presiding Judge

August 12, 2014

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